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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 677

SAM GOODY,

Petitioner,

against

SHAPIRO, BERNSTEIN & CO., INC., GERSHWIN PUBLISHING CORPORATION, EDWARD B. MARKS MUSIC CORPORATION, MILLER MUSIC CORPORATION, LEWIS MUSIC PUBLISHING COMPANY, INC. and MUTUAL MUSIC SOCIETY, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix C 20-34)[1] is reported in 248 F. 2d 260.

The opinion of the United States District Court for the Southern District of New York (Appendix C 35-58) is reported in 139 F. Supp. 176.

[1] Appendix references are to Appendices A-C of the petition.

Jurisdiction

The judgment of the Court of Appeals was made and entered on September 28, 1957 (Appendix A 14).

The jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1)

Statute Involved

Sections 1(a), 1(e) and 101(e) of the Copyright Act of March 4, 1909, c. 320, Title 17, U.S.C., (35 Stat. 1075, *et seq.*), as codified and enacted into positive law by the Act of July 30, 1947, c. 391 (61 Stat. 652). Sections 1(e) and 101(e) are contained in Appendix B (15, 16, 18, 19). Section 1(a) which has been omitted from the petition, together with the heading of section 1, reads as follows:

"§ 1 Exclusive Rights As To Coyprighted Works.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exeusive right: (a) To print, reprint, publish, copy, and vend the copyrighted work;" (Subsections (b) to (e) inclusive, setting forth such additional exclusive rights, follow subsection (a)).

Question Presented

Accurately stated the question is whether, in that part of section 101(e) reading "then in case of infringem nt of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts", the word "sale" should be deemed superfluous and accorded no significance, thereby absolving the non-manufacturing seller of liability for the sale of infringing parts (records).

Statement of the Case

The petitioner, Sam Goody, operates a large retail store for the sale of phonograph records and related merchandise at "cut rate" prices, such operation being conducted by him on a very substantial scale (R. 64, 111, 112).[2]

Each of respondents is one of the leading music publishers in the United States, and each of the musical compositions the subject of the action is one of the principal compositions in their respective catalogues (R. 64). The causes of action of respondents against petitioner (R. 11-46) are for the infringement of their respective musical copyrights by his sale of parts of instruments (phonograph records) serving to reproduce mechanically such copyrighted compositions, the manufacture, use or sale of which parts was unauthorized, either by respondents or under the compulsory license provision of Sec. 1(e) of the Act. They were manufactured and sold by a procedure known in the trade as "bootlegging" (R. 65).

This action was instituted at the instance of one Harry Fox, in his capacity as the exclusive agent and trustee for over 300 of the leading music publishers in the United States in the licensing of the right to manufacture and sell legitimate phonograph records serving to reproduce their copyrighted musical compositions, and in the prosecution of actions for the unauthorized and illegal manufacture and sale of records serving to reproduce such compositions, including by "bootlegging".

Such "bootlegging" is perpetrated either (1) by making an unauthorized master recording from a legitimate record and then making copies therefrom, or (2), as in the instant case, by making an unauthorized off-the-air recording of the radio or television performance of a musical composi-

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[2] Record references are to the Plaintiffs-Appellants' Appendix below, no other appendix having been filed.

tion by a famous artist, of which a prior authorized recording had been made and a public demand created by the legitimate manufacturer and dealers. In either case the costs and charges of the artist, musicians, recording personnel, union, overhead, advertising, and royalty payments to the music publishers and authors, are thereby eliminated. Such records are then sold to unscrupulous dealers at a substantially lower price than the legitimate records. The "bootleg" records are then palmed off on the public by such dealers specializing in this type of operation, bearing the same marked price as the legitimate records, at a reduced price in direct competition with and as a substitute for the authorized records (R. 65).

The "bootleg" records in the instant case were made from off-the-air recordings of radio broadcasts of one Glenn Miller, an outstanding orchestra leader, and orchestra. They were manufactured and sold as a substitute for records of the legitimate recordings made by Glenn Miller and orchestra for R.C.A. Victor; it being known in the trade that the only legitimate records were those of R.C.A. Victor (R. 69, 70).

It is the invariable practice of every legitimate record manufacturer to print on the record label both the trade name of the manufacturer and the trade mark by which his product is known to the trade, and to likewise print on the record label or jacket or both the full name and address of the manufacturer. However, on the labels and jackets of these records there is merely printed the legend "An A.F.N. Presentation" (coined only for these records) and neither the name nor address of the manufacturer appears on either the record label or the jacket. This is an infallible earmark of a "bootleg" record (R. 66).

The manufacturer of the "bootleg" records is invariably an irresponsible individual with no business address. In instances where service of process may be effected upon him, he nevertheless continues to flood the market with

the same records under different specially coined names, through the same dealers. Accordingly, the only recourse of the legitimate record manufacturer and dealers and the music publishers to curtail a condition, which is rapidly mushrooming into a serious threat to their mutual interests, is to proceed against the dealers who are primarily responsible for the success of this illegal operation (R. 67, 68).

After an extensive investigation it was ascertained that the "bootleg" records in the instant case were being manufactured by one Joseph Krug. Having failed to obey an order and subpoena of the District Court, he was taken into custody of the United States marshal and lodged in jail, pending the hearing of a motion to punish him for contempt. He later appeared before a special master and gave testimony that he had recently been in the employ of an automobile repair shop; that he had no business cards, stationery or bill heads; that he had no place of business or employees and no telephone listing; that the records were manufactured for him in New Jersey and delivered by him in person to petitioner; that petitioner knew he was not a record manufacturer; that he never furnished and was not called upon to furnish petitioner with a statement of the records sold him; that none of the receipts from petitioner therefor were deposited; that in most instances such payments were made in cash and when made by check it was cashed for him; that if a receipt was requested for such cash payments he used a rubber stamp on a blank form of receipt; and that such records were listed by petitioner at the same price as the legitimate records and then offered for sale by him at approximately half the list price (R. 71, 72). Petitioner concedes that "He made no specific inquiry of Krug with reference to the statute". (Petition 3)[3]

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[3] Petition references are to the instant petition.

The District Court said in its opinion that it was not "moved by defendants' protestation of innocent intent" as the foregoing factors "were clear indications that he [Krug] was a record pirate" (R. 190, 191).

In the answer of petitioner it is admitted that he continued to sell the "bootleg" records, even after written notice that the sale thereof was unauthorized and illegal (R. 62).

ARGUMENT

A.

The petition for a writ is in the sole interest of petitioner and a nominal number of other dealers likewise trafficking in "bootleg" records, in an attempt to legalize their unlawful conduct under the guise of a construction of the statute.

Petitioner refers to the comment of the Court of Appeals, that this is the first time that the courts have been called upon to construe the pertinent provisions of the statute (Petition 5). As copyright infringement in the sale of "bootleg" records is only a recent occurrence in the industry, there had been no occasion until shortly prior to the institution of this action to seek redress therefor. Furthermore, in all other instances, where suit has since been brought, the liability of the dealer under the clear wording of Section 101(e) has never previously been questioned (R. 67, 68).

When petitioner speaks of the importance to a "growing industry" of a construction by this Court of the statute, he obviously can only have reference to that growing segment of the industry trafficking in "bootleg" records (Petition 5).

B.

Petitioner's entire argument is predicated upon the false premise that the only exclusive right and protection accorded a copyright proprietor is in the "manufacture" of records.

Petitioner would contend that the only exclusive statutory right the copyright proprietor acquires and can enforce is that of manufacture; and that the Court of Appeals erroneously interpreted the statute to comprehend "make, use and vend" (Petition 9, 10).

The prior act, section 4952 (c. 3, Rev. Stat., Title 60), gave the "author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition * * * the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same".

In *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U. S. 1, 28 Sup. Ct. 319, this Court said with respect to the prior act (pp. 16, 18):

> "When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original."
>
> * * * * *
>
> "As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases."

The foregoing determination of this Court brought about the amendment of the act, by the enactment of sections 1(e) and 101(e) in their present form.

Section 1 provides that "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:" (each of which exclusive rights is then set forth in subsections (a) to (e) inclusive following). Under subsection (a) such exclusive right comprehends to "vend the copyrighted work". Then under subsection (e) such exclusive right to "vend" is specifically made applicable to phonograph records by the provision "for the purposes set forth in subsection (a) hereof, to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced." To support his argument that the exclusive rights granted a copyright proprietor under subsection (e) do not include the right to "vend", petitioner necessarily avoids all reference to subsection (a).

The only limitations in subdivision (e), upon the extent of the exclusive rights granted under "the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work", are that they shall include only compositions published after July 1, 1909, and shall not include the work of a foreign author or composer except under certain conditions. This confirms that such right of control is inclusive of the right to make, use and "vend".

Furthermore, subsection (e) provides that the payment of the royalty therein provided shall free the articles or devices for which such royalty has been paid from "further contribution to the copyright except in case of public performance for profit". This again confirms that such right of control is inclusive of the right to make, use and "vend".

C.

Section 1(e) relates to the obligations of a "manufacturer" to the "copyright proprietor" under the compulsory license provisions thereof, while section 101(e) relates to the remedies accorded a "plaintiff" in an action of infringement for the "unauthorized manufacture, use, or sale" of records.

Section 1(e) contains what is referred to in section 101(e) as the "compulsory license provision of this title". This provision relates solely to the royalty payments and accounting to be made by a "manufacturer", who relies upon such provision in the absence of a license from the copyright proprietor. It provides that whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce the same mechanically, any other person may make similar use upon payment to the "copyright proprietor" of a royalty of 2 cents on each such part "manufactured", to be paid by the "manufacturer" thereof; that the "copyright proprietor" may require, and if so the "manufacturer" shall furnish a report under oath monthly of the parts manufactured during the previous month, at which time the royalties therefor shall be payable; and that in case of failure of the "manufacturer" to pay to the "copyright proprietor" the royalties due after written demand he may be liable for an additional sum not exceeding three times such amount.

Accordingly, section 1(e) provides only for the royalties to be paid and the reports to be furnished to the "copyright proprietor" by the "manufacturer" who has relied upon the compulsory license provision. It has no application whatever to an infringement of a copyright by the "unauthorized manufacture, use, or sale" (section 101(e)) of such parts over which the "copyright proprietor" is given as aforesaid the exclusive right of control.

On the other hand, section 101(e) makes provision for the remedies of "the plaintiff", in an action brought by the copyright proprietor for the infringement of his exclusive right to manufacture, use and vend. Accordingly, while the phraseology employed in section 1(e) relates to the rights and obligations of a "manufacturer" to the "copyright proprietor" under the compulsory license provision thereof, the phraseology employed under section 101(e) relates to the remedies accorded a "plaintiff" in an action of infringement for the unauthorized "manufacture, use, or sale" of such parts. In this respect 101(e) provides that whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon parts serving to reproduce the same mechanically, "then in case of infringement of such copyright by the unauthorized manufacture, use, or sale" of such parts, an injunction may be granted upon such terms as the court may impose and the "plaintiff shall be entitled to recover" in lieu of profits and damages the royalty provided.

Petitioner concedes that upon the enactment of section 1(e) Congress then added section 101(e) to provide for "additional remedies of the copyright owner" (Petition 10) whereby the "phraseology used in the compulsory licensing provisions of section 1(e) differs from that used in the implementing provisions of section 101(e)" (Petition 7).

Section 101(e) further provides "that whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments" serving to reproduce the same mechanically, "relying upon the compulsory license provisions of this title, he shall serve notice of such intention" and send a duplicate to the Copyright Office.

Upon a manufacturer evidencing "such intention", as aforesaid, he becomes a licensee with respect to all records thereafter manufactured under the compulsory license.

Any subsequent failure on his part to make the royalty payments, for the records manufactured under the license could not possibly constitute the "manufacture, use, or sale" thereof an infringement. However, in the absence of a license agreement, or the service of notice of such intention, then the "manufacture, use, or sale" is unauthorized and constitutes an infringement under the provision of section 101(e).

D.

The deliberate employment by Congress of the clear and concise wording, "unauthorized manufacture, use, or sale" as constituting an infringement, cannot possibly be construed as signifying an intent to limit infringement to the sole act of manufacture.

Petitioner says "Both the District Court and the Court of Appeals recognized the ambiguities in the statute" (Petition 8).

On the contrary, the Court of Appeals said that "A natural reading of these sections leads us to the conclusion that a seller of unauthorized records of copyrighted music, although having no connection with the manufacturer, is an infringer and liable for damages which the Act provides."; that "section 101(e) clearly classifies the sale of unauthorized records as an infringement"; and that "our interpretation accords significance and effect to all the words of the statute. Ex parte Public Bank, 278 U. S. 101, 104." (Appendix C 26-28.)

Furthermore, the District Court recognized that section 101(e) "does not specifically limit that right to recover from the manufacturer" and that any "adverse ruling will deprive the phrase 'manufacture, use or sale' of any meaning" (R 197, 198).

As this Court said in *Ex Parte Public Bank, supra* (p. 104), 49 Sup. Ct. 43:

> "No rule of statutory construction has been more definitely stated or more often repeated than the cardinal rule that 'significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' *Market Co.* v. *Hoffman*, 101 U. S. 112, 155."

In *Louisville & Nashville R. R. Co.* v. *Mottley*, 219 U. S. 467, 475, 31 Sup. Ct. 265, this court said:

> "The words 'or different,' looking at the context, cannot be regarded as superfluous or meaningless. We must have regard to all the words used by Congress, and as far as possible give effect to them. Market v. Hoffman, 101 U. S. 112, 115."

Likewise, in *United States* v. *Missouri Pacific R. Co.*, 278 U. S. 269, 278, 49 Sup. Ct. 133, this Court said:

> "Construction may not be substituted for legislation [and where it] does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended."

In *Moore* v. *United States*, 249 U. S. 487, 489, 39 Sup. Ct. 322, this Court said quoting from *United States* v. *Temple*, 105 U. S. 97, 99, that the statute must be read "according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending its operation."

In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 392, 60 Sup. Ct. 907, this Court said that if possible, a stat-

ute will always be given that construction "which will preserve the vitality of the Act and the utility of the language in question."

In *United States* v. *Powers*, 307 U. S. 214, 217, 59 Sup. Ct. 805, this Court said quoting from *Bird* v. *United States*, 187 U. S. 118, 124, that there is a presumption "against a construction which would render a statute ineffective or inefficient."

In *Gemsco, Inc.* v. *Walling*, 324 U. S. 244, 258, 65 Sup. Ct. 605, this Court said that a statute should not be construed "by reading out of its purview the only means for making it effective."

In *Washingtonian Co.* v. *Pearson*, 306 U. S. 30, 36, 59 Sup. Ct. 397, this Court said with respect to the 1909 amendment which added sections 1(e) and 101(e):

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary works of lasting benefit to the world.'"

E.

The definition of an infringement in Section 101(e) of the Copyright Act is the same as in Section 271(a) of the Patent Act under which it has been uniformly held that the non-manufacturing seller of an infringing device is an infringer.

Petitioner concedes that the wording "unauthorized manufacture, use, or sale" as constituting an infringement was patterned after the Patent Act (Petition 11, note 17).

Section 101(e) of the Copyright Act provides that "in case of an infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts," et cetera.

Section 271(a) of the Patent Act (Act of July 19, 1952, c. 950, U.S.C., Title 35, 66 Stat. 811) likewise provides that "Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention within the United States during the terms of the patent thereof, infringes the patent." This section is a codification of section 40 (Rev. Stat. Sec. 4884, U.S.C. Title 35) and section 70 (Rev. Stat. Sec. 4921, U.S.C. Title 35).

Section 40 provided that every patent shall contain a grant "of the exclusive right to make, use, and vend the invention, or discovery." Section 70 provided that the courts vested with jurisdiction shall have power "to prevent the violation of any right secured by patent" and "upon a decree being rendered in any such case for an infringement" to make an award.

In *Walker On Patents*, Deller's Edition, Vol. III, Sec. 450, page 1681, speaking of former sections 40 and 70, it is said:

> "An infringement is the unauthorized making or using or selling of the patented invention. Christensen v. Nat. Brake & Elect. Co., 18 F. 2d 981; George Close Co. v. Ideal Wrapping Machine Co., 29 F. 2d 533, 535, C.C.A.I. (1928)."

In *George Close Co.* v. *Ideal Wrapping Machine Co.*, *supra* (p. 535), the Court said that an infringement of a patent is "a breach of the right to make, to use, or to vend."

In *J. R. Clarke Co.* v. *Murray Metal Products Co.*, 219 F. 2d 313 (Cir. 5), decided 1955 subsequent to the enactment of Section 271, the cause of action against defendant

was for the sale of an infringing device, which it had acquired from the manufacturer. The Court said (p. 315):

> "The failure to join the manufacturer of the accused device as a party defendant in this suit is not material in view of appellant's option under 35 U.S.C. § 271 to charge with infringement 'whoever without authority *makes, uses or sells* any patented invention,' etc." (Emphasis that of Court.)

In *Bauer & Cie* v. *O'Donnell*, 229 U. S. 1, 13, 33 Sup. Ct. 616, this Court in comparing the copyright statute to the patent statute said:

> "Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same."

In *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 402, 405, 60 Sup. Ct. 681, this Court said:

> "The analogy found in cases of patent infringement is persuasive."
>
> • • • • •
>
> "We see no reason why these principles should not be applied in copyright cases."

In *Caliga* v. *Inter Ocean Newspaper Co.*, 215 U. S. 182, 190, 30 Sup. Ct. 38, this Court, in holding that the accepted construction of a provision in the patent law was controlling with respect to a like provision in the copyright law, said:

> "We think the same principle, in this aspect, controls, as in the case of a patent."

In *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 158, 68 Sup. Ct. 915, this Court held adversely to the construction of the Copyright Act for which the defendants contended, as being "in violation of the principle of the patent cases."

F.

Intention to infringe is not essential. A dealer in records has a ready and infallible means of ascertaining if they are an infringement, which factor is not applicable to a dealer in any other type of copyright material.

The District Court said petitioner was aware that the manufacturer in the instant case (Krug) was a record pirate (R. 190, 191). A dealer, having records offered to him for resale by one whose responsibility is questionable, can very readily require such party to exhibit a license or, in the absence thereof, of a certificate from the Register of Copyrights of the filing under section 101(e) of the required notice of his intention to make such use. Petitioner concedes that he never even made an inquiry of Krug regarding his authorization (Petition 3).

With such means of definitely ascertaining if the manufacture is authorized, a record dealer can never be deemed an innocent infringer. There are no means available to a dealer in any other type of copyright material of ascertaining if it is an infringement. Yet, in *Woolworth Co.* v. *Contemporary Arts*, 344 U. S. 228, 73 Sup. Ct. 222, involving the infringement of a copyright on a statue, although the defendant, a dealer, was an innocent infringer with gross profits of only $899.16, this Court affirmed an award of $5,000 against it saying (p. 233):

> "The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."

For as this Court had said in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U. S. 191, 51 Sup. Ct. 410, speaking of the Copyright Act:

"Intention to infringe is not essential under the Act. Compare Hein v. Harris, 175 Fed. 875, affirmed 183 Fed. 107; Stern v. Remick & Co., 175 Fed. 282; Haas v. Leo Feist, Inc., 234 Fed. 105; M. Witmark & Sons v. Calloway, 22 F. (2d) 412, 414."

And as is said in *Drone On Copyright* (p. 404):

"If innocent motives or ignorance could be successfully pleaded as a defence to a charge of infringement, the protection intended for literary property would be wholly inadequate. The injury done to an author by an unlicensed use of his work is none the less when the appropriation has been made without a bad intention, or through ignorance. Hence, the remedy should be not less complete."

Petitioner's principal argument (Petition 12) is based upon the contention that the infringing manufacturer may at any time, even after judgment, comply with the compulsory license provisions of the Act and pay the back royalties, thereby freeing the records theretofore manufactured from their infringing status. Accordingly, says petitioner, the liability of the seller should not be predicated upon such a contingency. In support of this contention petitioner cites *G. Ricordi & Co.* v. *Columbia Graphophone Co.*, 263 Fed. 354 (Cir. 2).

Petitioner advanced the same argument in the Court of Appeals based upon its alleged determination in the *Ricordi* case to such effect. However, the Court of Appeals unequivocally disavowed such a determination, saying such "argument misconceives the holding in the *Ricordi* case", as it was a far cry from holding that such "payment exonerates any and all prior infringers from liability already incurred" (Appendix C 27, 28).

CONCLUSION

As the Court of Appeals said, "Section 101(e) clearly classifies the sale of unauthorized records as an infringement". The petition should be denied.

Respectfully submitted,

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